

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 844 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA and
MR.JUSTICE R.R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

SUKHPALSING IQBALSING GIL

Versus

STATE OF GUJARAT

Appearance:

MR MUKESH D RAVAL and Mr.B.C.Dave,Advocates for Petitioner
The petitioner Sukhpalsingh Iqbalsingh Gill is also
present.

Mr.R.M.Chauhan, learned ADDL.PUBLIC PROSECUTOR
for Respondent Nos. 1,2 and 3.

Mr.Tarun Barot, Police Inspector,Detection Crime Branch,
Ahmedabad City is also present.

Mr.Kirit Patel,Advocate for Respondent No. 6
Respondent No.6 herself is also present in
custody from Jail at Baroda.

Mr.H.R.Dhoraja (boy's Mausee's husband is also
present.

CORAM : MR.JUSTICE M.R.CALLA and
MR.JUSTICE R.R.TRIPATHI

Date of decision: 15/10/1999

ORAL JUDGEMENT(Per M.R.Callan,J)

1. Rule. Mr. R.M.Chauhan, learned Addl.P.P., waives service of rule on behalf of respondents Nos.1 to 3. Mr. Kirit Patel waives service of rule on behalf of respondent No.6. Respondents Nos.4 and 5 are said to be domestic servants of respondent No.6 and they are not found to be necessary parties and, therefore, their names are sought to be deleted by the learned counsel for the petitioner. Names of respondents Nos.4 and 5 stand deleted from the array of respondents accordingly.

2. In the facts and circumstances of this case, the matter is taken up for final disposal.

3. The present petitioner and respondent No.6 had married in January 1992. Out of this wedlock, a male child was born to them, who is named Jayrajsing. It appears that some time in the year 1995 a dispute arose between the present petitioner and respondent No.6 and they started living separately in 1995 while the boy named Jayrajsing was only one and half years old at that time. The mother of the boy Jayrajsing, namely, Pragnaben, obtained an order with regard to the custody of the child in her favour and since then the child has been living with her. The petitioner has come with the allegation that a criminal complaint was filed against his wife under the provisions of Immoral Traffic (Prevention) Act, 1956 and thereupon a case was registered being C.R.No.II-3207/99 by the Police Inspector, PCB, Ahmedabad City on 22.6.99. It was further alleged that many complaints are registered against her and that she is a head strong lady. It was also alleged that she is detained under the provisions of Prevention of Anti-social Activities Act on 24.9.99 and was lodged in the Baroda Central Prison under detention as a PASA detainee. Naturally with the detention of his wife, the present petitioner, being the father of the boy, namely, Jayrajsing got worried about the fate of the child in absence of the mother, who was held up in custody as detainee and, therefore, after making efforts to know the whereabouts of the boy, he filed the present petition on 29.9.99 in the nature of habeas corpus before this Court. On 30.9.99 Special Criminal Application was entertained by a Division Bench of this Court and notice returnable on 7.10.99 was issued and it was also ordered that the necessary arrangement be made to bring respondent No.6 i.e. Pragnaben before this Court on the returnable date and further directed that respondent No.2 i.e. Police Inspector of Amraiwadi Police Station will

inquire into the matter and submit the report. When the matter came up before this court on 8.10.99 it was noticed that the Court's orders were not taken in the right earnest by Amraiwadi Police Station and despite Court's order dt.30.9.99 till 7.10.99, no effective steps were taken. In the facts and circumstances, as we noticed, the job with regard to the production of the child was entrusted to the Detection Crime Branch, Ahmedabad City and for that purpose the papers were ordered to be sent on 8.10.99 to the Addl. Commissioner of Police, Detection Crime Branch, Ahmedabad City. The Detection Crime Branch has been able to trace out the boy from his Mausee (mother's sister) and today the boy named Jayrajsing has been produced before this Court by Police Inspector Mr.Tarun Barot and respondent No.6 has also been produced from Baroda Jail.

4. It has been given out by Mr.Kirit Patel appearing on behalf of respondent No.6 that at the time when she was detained on 24.9.99 she had handed over the custody of the child Jayrajsing to her nephew i.e. brother's son, namely, Vimal Patel, who is running a Factory and said Vimal Patel in turn handed over the custody of the child to the Mausee i.e. Manjrikaben, wife of H.R.Dhorajia, who is holding a responsible post in the Government of Gujarat as a Deputy Executive Engineer. It has been given out by them that the child is living happily with his Mausee and by no means it can be said that the child is in illegal custody or in unlawful detention.

5. While the petitioner claims that while mother of the child is under detention he being the father of the 5-6 years old boy is his natural guardian and when the mother, to whom custody was given under the Guardian And Wards Act in 1995, herself is now in jail as a detenue, the custody of the child must be given to him. So far as this Court is concerned, in a petition of habeas corpus, the Court is only concerned with regard to the question as to whether the child is in unlawful custody and illegal detention or not and further that whether the child is living happily and is comfortable at the place where he is living. There is no dispute between the parties that the child's mother respondent No.6 was residing in Triveni Apartment, Maninagar while child's Mausee is residing at 8, Sunder Apartment, Sundervan Society, Gordhanwadi Tekra, Kankaria, Maninagar, Ahmedabad and there is no dispute that the boy is studying in Diwan Ballubhai School at Kankaria in First Standard while the father lives in Shahibaug area in city of Ahmedabad itself. Learned counsel for the respondent No.6 Mr.Kirit

Patel has also placed reliance on a decision of this Court in the case of Harichand Ratanchand v. Virbala, reported in XV GLR 499. There cannot be any quarrel with the proposition of law that the minor is not to be unsettled from a settled home without any justification, the fundamental question which arises is as to whether the minor should be uprooted from the settled home when child's happiness depends upon his playmates, associates, his work, the school and his home, where he gets all love and affection which he needs for proper growth and child's welfare and his happiness is the paramount consideration. Before this Court, there is no question of the custody of the child to be given under the Guardian and Wards Act and as such it cannot be said to be a lis under the aforesaid Act between the father and mother for the purpose of custody of the child. In this petition of habeas corpus we are only concerned to ascertain as to whether the boy is safe and as to whether he is detained unlawfully or whether he has been illegally confined. For this purpose, looking to the facts of the case in its entirety, we also availed the services of an independent lawyer, who is also a social worker in her own right, namely, Ms. Kubra Vali Karimwala, who was incidentally present in the Court and through her we tried to ascertain the wishes of about six years old child Jayrajsing and in the open Court, the boy while clearly identified his father, who is present in the Court, made it expressly clear that he wanted to live with his Mausee, that he was happy with his Mausee and from the very manner in which he has responded to Ms. Kubra Vali Karimwala's questions and the way in which he has taken the Court proceedings and his behavior in the Court, we find that the boy is quite comfortable. He answered the questions put to him unhesitatingly. Thus we find that it is a case in which at the moment, when there is no question of any unlawful confinement or illegal custody and the boy is happily living with his Mausee alongwith his other playmates, who are said to be there in the family of his Mausee, it will not be appropriate to unsettle him from the home where he is happy and we do not find it either necessary or desirable to send him to a new environment and set up at this stage through these proceedings. It was also given out that so far the boy could not be sent to School under the fear that his father may take away the boy directly from the School and Mr.Kirit Patel, under instructions from H.R.Dhorajia (boy's Mausee's husband), who is present in the Court, states that henceforth the boy will be regularly sent to the School. We, therefore, find that so far as the purpose for which this habeas corpus petition was entertained, stands duly served and no

orders are required to be passed. The boy may continue to remain with his Mausee till his mother returns home or till the Application, if any, moved by the father under Guardian and Wards Act is decided by the competent Court whichever is earlier. In case any order is passed by such court now, the consequences shall follow.

6. So far as the custody of the child, as claimed by the father is concerned, it may be observed that it is open for the father to move an appropriate Application under S.9 of the Guardian and Wards Act before the competent Court to obtain appropriate orders, in the changed circumstances and nothing said or observed in this order or in any order prior to this passed by the court under Guardian and Wards Act, will come in the way of such Court while considering such a request of the father for the purpose of custody of the child in accordance with law on the basis of the developments which have taken place in recent past after the earlier order - which was earlier passed in mother's favour, however the child's happiness and welfare will be the paramount consideration.

7. The learned counsel for the petitioner has also submitted that his client may be allowed to meet his son at the son's Mausee's place every week for some time. While it is not for this court to make any direction or order in this regard, it is recorded with the consent of the father of the child and husband of Manjrikaben, (boy's Mausee) namely, H.R.Dhorajia that it will be open for the present petitioner to meet his son Jayrajsing at his Mausee's place at least once a week on every Sunday with prior intimation to Mr. Dhorajia on Telephone No.5321949 for a period of 1 to 2 hours from 10.0 A.M. to 12.0 P.M. and it is also agreed that the present petitioner will not interfere with the studies of the child in any manner either for the purpose of meeting him or when he is on his way to the School and back to home.

This Petition is disposed of accordingly and rule is hereby discharged.